Appeals, five members dissenting, sustained the Commissioner (R. 28-41). On appeal the decision of the Board of Tax Appeals was reversed [75 F. (2) 981], and the Commissioner applied for, and obtained, writs of certiorari from this Court.

Summary of Argument.

The transaction here involved is within the express terms of the statute [Revenue Act 1924, Sec. 203 (b) (2)], which provides that

> "No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization."

The transaction here involved is also within the spirit of the statute: there is no claim or even suggestion that it was a device to avoid taxation, or that it was a sale masquerading as a reorganization, or that it was conceived or consummated for any purpose except the advancement of the legitimate corporate purposes of the corporations concerned.

This case is governed by the Revenue Act of 1924. The historical development of the statute shows that in 1924 Congress re-enacted the pre-existing statute without change, insofar as it affects this case, although the departmental regulations previously promulgated had, in express and clear language, defined just such a transaction as this as a reorganization within the statute. Such re-enactment, in the light of the administrative interpretation, gives the interpretation the force of law.

The cases relied on by petitioner are not in point. They dealt with transactions in which one or more of the follow-

ing elements have been held or are claimed to take the case out of the terms of the statute:

(a) A sale for cash or cash and promissory notes of the purchaser;

(b) a transfer of stock which constituted less than a majority of each class of stock of the corporation;

(c) a transfer of assets which were not all or substantially all the property of the corporation;

(d) a transfer which was merely a bookkeeping transaction between a corporation and its wholly owned subsidiary.

In our case the transaction involved *all* the stock of Alloys; there was not a sale, but an exchange; no part of the property received on the exchange was cash, but all of it was stock or securities; the transaction was between strangers and not subsidiaries, and it was a *bona fide* transaction for the advancement of the legitimate corporate purposes of the two corporations concerned.

POINT I.

The transaction here involved falls within the express words of the statute. It is also within the spirit of the statute, having been consummated solely for the purpose of carrying out legitimate corporate purposes. Hence the transaction constituted a reorganization under the statute.

The Revenue Act of 1924 provided [Sec. 202 (d)]:

> "In the case of a sale or exchange, the extent to which the gain or loss determined under this section shall be recognized for the purposes of this title, shall be determined under the provisions of Section 203."

Section 203 (b) (2) provided:

> "No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization."

The question presented is: Was the transaction here involved a "Reorganization"?

The statute itself points the answer. Section 203 (h) (1) provided:

> "The term 'reorganization' means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation), or * * *."

It is settled by the decisions of this Court:

(1) "The words within the parentheses may not be disregarded. They expand the meaning of 'merger' or 'consolidation' so as to include some things which partake of the nature of a merger or consolidation but are beyond the ordinary and commonly accepted meaning of those words—so as to embrace circumstances difficult to delimit but which in strictness cannot be designated as either merger or consolidation." (*Pinellas Ice Company* v. *Commissioner*, 287 U. S. 462, 469-470.)

(2) Even though a transaction is within the dictionary meaning of the terms of the statute, the question remains whether it is or is not

> "* * * an operation having no business or corporate purpose—a mere device which put on the form

> of a corporate reorganization as a disguise for concealing its real character, and the sole object and accomplishment of which was the consummation of a preconceived plan, not to reorganize a business or any part of a business, but to transfer a parcel of corporate shares • • •."

If

> "the whole undertaking, though conducted according to the terms of [the statute], was in fact an elaborate and devious form of conveyance masquerading as a corporate reorganization, and nothing else,"

the statute does not apply to it. (*Gregory* v. *Helvering*, 293 U. S. 465, 469, 470.)

(3) If, on the other hand, the transaction is not a device to transfer property, masquerading as a reorganization, the statute is controlling:

> "• • • the fact must not be overlooked that we are here concerned with a taxing act, with regard to which the general rule requiring adherence to the letter applies with peculiar strictness. In *United States* v. *Merriam*, 263 U. S. 179, 187-188, after saying that 'in statutes levying taxes the literal meaning of the words employed is most important, for such statutes are not to be extended by implication beyond the clear import of the language used,' we quoted with approval the words of Lord Cairns in *Partington* v. *Attorney-General*, L. R. 4 H. L. 100, 122, that 'if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute.'" (*Crooks* v. *Harrelson*, 282 U. S. 55, 61.)

There is no claim that this transaction was a device to dodge taxes, or that it was not undertaken for purposes germane to the conduct of the businesses of the corporations concerned, or that it was a conveyance masquerading as a corporate reorganization. On the contrary, it has never been disputed that all parties believed it would be a commercial advantage to both corporations, and in furtherance of their legitimate corporate purposes, to have Vanadium take over the business of Alloys and that it was for this reason, and none other, that the transaction was conceived and consummated. In such circumstances, the transaction is within the spirit, as well as the letter, of Section 203 (h) (1) and any gain therefrom is not to be recognized for income tax purposes until such later time as the property received on the exchange is disposed of.

Petitioner's Contentions.

In the Court below petitioner admitted in his brief:

> "In the instant case the transaction comes within the parenthetical clause of A"—

referring to subdivision "A" of Section 203 (h) (1). Petitioner argued, however, that the transaction was not a reorganization because

> "• • • there is nothing in the agreement or elsewhere in the record to indicate that they intended that Alloys should be dissolved, or merged with Vanadium, or that a new corporation should be created to take over the assets of Alloys and Vanadium."

Thus, although it was admitted that the transaction is within the terms of the statute, petitioner claimed that the statute should not be given effect because the agreement did not

provide for the dissolution of Alloys. This claim is now reasserted (Petitioner's Brief, pp. 11, 14).

The provisions of the statute itself, as well as its historical development, show that dissolution is not a necessary element of reorganization in such a transaction as this one.

In the first place, the statute, by its terms, makes no provision for dissolution. The Court should not add a condition which Congress has omitted (*Crooks* v. *Harrelson*, 282 U. S. 55, 61; *U. S.* v. *Goldenberg*, 168 U. S. 95, 102-103).

Secondly, the Act expressly provides that the transfer of a *mere majority* of the stock of a corporation may constitute a reorganization. Yet Congress must have known that it requires the concurrence of *more* than a majority of the stock to effect a dissolution, so that neither the transferror nor the transferee of a mere majority of the stock could undertake that dissolution would follow. Consequently, Congress could not have intended to make dissolution a necessary element of reorganization.

Thirdly, a consideration of the history of the reorganization provisions and of their interpretation in the Regulations of the Treasury Department, shows that in certain cases dissolution is deemed a requisite by the Department and in others it is not; and that the transaction here involved is in the latter, and not the former, category. This case arises under the 1924 Act. The Regulations, as originally issued by the Treasury Department under the 1918 Act (Reg. 45, Art. 1567, *infra*, p. 23) described the forms of reorganization under the statute as follows:

> "(a) the dissolution of corporation B and the sale of its assets to corporation A, or (b) the sale of its property by B to A and the dissolution of B, or (c) the sale of the stock of B to A and the dis-

solution of B, or (d) the merger of B into A or (e) the consolidation of the corporations."

It will be observed that only in the cases of (a), (b) and (c) was dissolution stated to be a requirement. Even that condition, however, prevailed only for a period of about five months, when, by Treasury Decision 2924 (*infra*, pp. 29-30), the requirement of dissolution was eliminated in those cases falling under (c) wherein *all* of the stock of another corporation was acquired, as is the fact in the instant case. This followed from the fact that there was added to the regulation the provision (see *infra*, p. 30) that in cases where the transferee corporation became obliged, by virtue of Section 240 (b) of the Statute and Article 633, to file a consolidated return for itself and the corporation whose stock it acquired, *i. e.*, where the former acquired *all* of the stock of the latter, such a transaction should be deemed a reorganization. Such recognition that a consolidated return would be required *after the reorganization* shows that it was contemplated that both corporations would continue in business and that neither of the corporations would be dissolved in the transaction.

In the Regulations issued under the 1921 Act [Reg. 62, Art. 1566 (b) *infra*, p. 24], the forms of reorganization were described thus:

> "(1) the dissolution of corporation B and the sale of its assets to corporation A, or (2) the sale of its property by B to A, or (3) the sale of the stock of B to A, or (4) the merger of B into A, or (5) the consolidation of A and B, or (6) the acquisition by A of a majority of the voting stock and a majority of the total number of shares of all other classes of stock of B or of substantially all of the properties of B, no taxable income is received from the transaction by A or B or by the stockholders of either corpora-

> tion A or corporation B, provided the sole consideration received by the stockholders is stock or securities of corporations A or B or any corporation a party to or resulting from the reorganization."

It will be observed that what were Subdivisions (b) and (c) in the 1918 regulations became Subdivisions (2) and (3) in the 1921 regulations, BUT THAT THE PROVISIONS FOR DISSOLUTION, WHICH WERE PART OF (b) AND (c) IN 1918, WERE DROPPED WHEN THEY BECAME (2) AND (3) IN 1921; FURTHER, THAT A SUBDIVISION KNOWN AS (6) WAS ADDED IN 1921, WHICH EXPRESSLY COVERS THE PRESENT CASE, AND WHICH CONTAINS NO PROVISION FOR DISSOLUTION.

After these administrative interpretations had been consistently applied through a period of nearly five years, *Congress, in the 1924 Act—the statute which rules this case—re-enacted provisions of the 1921 Act which were practically word for word the same as subdivision (6) of the regulation issued under it.* Such re-enactment in the light of the administrative interpretation gives the interpretation the force of law (*Old Mission Portland Cement Co.* v. *Helvering*, 293 U. S. 289; *Helvering* v. *Bliss*, 293 U. S. 144; *Zellerbach* v. *Helvering*, 293 U. S. 172). Thus, from the law and from the administrative interpretation of the law, it is clear that dissolution was not made or deemed an essential element of reorganization, where *all* the stock of a corporation is acquired, as is the case here.

Petitioner emphasizes the fact (Brief, pp. 11, 16) that Vanadium did not assume *all* the liabilities of Alloys and urges that this indicates that the transaction was not in the nature of a merger or consolidation. There is nothing in the statute making it an essential of reorganization that

the transferee assume all the liabilities of the corporation whose stock is transferred. The very fact that the statute expressly provides that there shall be a reorganization within the meaning of the statute if a *majority* of the shares of a corporation are transferred, leaves no doubt that the assumption of liabilities is not a requirement. Except in the most unusual circumstances, indeed, it is difficult to imagine *any* circumstances, in which the transferee of a mere majority of the stock of a corporation would assume all the liabilities of the corporation whose stock is transferred. Yet the statute expressly provides that such a transaction may be a reorganization under the statute. The words of Mr. Justice BREWER in *U. S.* v. *Goldenberg*, 168 U. S. 95, bear repetition here (pp. 102-103):

> "The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used. He is presumed to know the meaning of words and the rules of grammar. The courts have no function of legislation, and simply seek to ascertain the will of the legislator. It is true there are cases in which the letter of the statute is not deemed controlling, but the cases are few and exceptional, and only arise when there are cogent reasons for believing that the letter does not fully and accurately disclose the intent. No mere omission, no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, justify any judicial addition to the language of the statute. * * * Certainly, there is nothing which imperatively requires the court to supply an omission in the statute, or to hold that Congress must have intended to do that which it has failed to do. Under these circumstances, all that can be determined is that Congress has not specifically provided that payment shall be made within ten days as one of the conditions of challenging the

action of the collector, and hence there is no warrant for enforcing any such condition."

In his brief in this Court (pp. 11, 15-16) the petitioner makes the contention that the transaction is not within the statute because the interests of respondents in Vanadium, after the exchange, were not proportionately as great as their interests had been in Alloys, prior to the exchange. The statute imposes no such requirement, and what Congress has deliberately omitted the Court may not add (*Crooks* v. *Harrelson*, 282 U. S. 55, 61; *U. S.* v. *Goldenberg*, 168 U. S. 95, 102-103). That the omission was intentional appears from the statute itself. Thus in cases where the transaction involves a transfer of *assets* in return for a controlling interest in the transferee [Cases falling under Subd. (B) of Sec. 203 (h) (1)], as distinguished from a case like ours, where the transaction involves a transfer of *stock* [Cases falling under Subd. (A) of Sec. 203 (h) (1)], the statute expressly provides that the transaction shall not be a reorganization within the meaning of the statute unless two things concur: (1) that assets are transferred; and (2) immediately after the transfer the transferror shall be in control of the transferee. *Subdivision (A), which governs this case, contains no such requirement.* It requires only that a majority or more of the stock of one corporation be acquired by another corporation. It does *not* require that the stock received by the transferror, on the exchange, be the same proportion of the stock of the transferee as the transferror held in the corporation whose stock was transferred, or that the transferror acquire *any* particular fraction of the stock of the transferee. Indeed, the petitioner admits in its brief in the *Minnesota Tea Company* case (incorporated, by reference, in his brief in this case, p. 10 *) that subdivisions

* There is no similarity between the facts in these cases and the facts in the *Minnesota* case.

(A) and (B) have entirely different legislative histories and are mutually exclusive. He says further (*Minnesota Tea Co.* Brief, p. 31):-

> "We do not contend, as suggested by the Court below, [In the *Minnesota* case] that the requirement of clause B is to be incorporated in clause (A)."

Petitioner admits, also (*Minnesota Tea Co.* Brief, p. 19):

> "So far as the clause A transfers are concerned the statute specifies no definite measure of continuity."

Thus the answer to the contention that this transaction should not be deemed a reorganization under the statute because respondent's stock interest in Vanadium was not as great as it had been in Alloys is found in the statute itself. All that is required by the terms of the statute to constitute a transaction a reorganization is (1) that a majority, or more, of the stock of a corporation be transferred and (2) that the consideration received therefor by the transferror be stock or securities. The reason is plain enough and was fully recognized by Congress. In such a transaction no profit is "realized" and the imposition of a tax would "seriously interfere with those business readjustments which are peculiarly necessary under existing conditions" (Report of House Committee on Ways and Means, No. 350, 67th Congress, 1st Session, p. 10. See also Congressional Record, Vol. 61, Parts 6-7, 67th Congress, 1st Session, pp. 6549, 6550, 6562, 6565, 6568, 6569; Senate Conf. Rep. No. 486, 67th Congress, 1st Session, pp. 17, 18). What the substituted securities will ultimately bring, as compared with the cost of the surrendered securities, still remains to be seen. As Judge Learned Hand said in the *Gregory* case, 69 F. (2) 809, 811, aff'd 293 U. S. 465:

> "Such transactions were not to be considered as 'realizing' any profit, because the collective interests still remained in solution."

Similarly, Circuit Judge SOPER said in the *Mead* case [72 Fed. (2) 22, 28]:

> "It will thus be seen that the general purpose of all of these reorganization provisions was the same, not merely to remove the impediment to corporate readjustments, but also to prevent the recognition of purely fictitious gains or losses in the administration of the income tax law."

Such transactions result in no actual realization of gain or of loss, and, to prevent the tax from being a bar to business adjustments which are deemed essential in industry, Congress has, for a period of many years, provided that they shall not be held to yield either gain for tax or loss for deduction, until the later day when their fruits are otherwise disposed of, and this has been the consistent departmental practice. For the petitioner now to be permitted to reverse this policy would be to contravene the statute and the established departmental practice, and, in addition, place a tax "on purely fictitious gains", *i. e.*, upon interests which "still remained in solution".

The petitioner further contends:

(1) That the decision herein is in conflict with *Pinellas Ice Co.* v. *Commissioner*, 287 U. S. 462; *Prairie Oil & Gas Co.* v. *Motter*, 66 Fed. (2) 309; *Von Weise* v. *Commissioner*, 69 Fed. (2) 439, certiorari denied, 292 U. S. 655; *Nelson* v. *Commissioner*, 75 Fed. (2) 696; and *G. & K. Mfg. Co.* v. *Commissioner*, 76 Fed. (2) 454;

(2) That the Treasury regulation referred to in the opinion below conflicts with the statute or with the construction placed upon the statute by this Court in the *Pinellas* case;

(3) That, insofar as the Court below has treated the bonds received by respondents as "securities", its decision

is inconsistent with its own prior decision in *Worcester Salt Company* v. *Commissioner*, 75 Fed. (2) 251; and

(4) That the transaction was not a reorganization because Alloys was not a party to the contract.

(1)

The decision below is not inconsistent with the decision of this Court in the *Pinellas* case; on the contrary, it follows that decision insofar as the case applies, *i. e.*, that the words within the parentheses in Section 203 (h) (1) expand the meaning of "merger or consolidation". On the facts, however, the *Pinellas* case is entirely different from this one. The transaction there was a *sale* for *cash and promissory notes.* This, as the Court pointed out (287 U. S. at p. 470), was not an "exchange" for cash and "securities", as permitted by the statute. In our case, there was an exchange, and not a sale, and the consideration received was "stock or securities", *i. e.*, stock of Vanadium and bonds of Alloys, secured by a trust mortgage.

The *Prairie Oil and Gas Company* case [66 F. (2) 309] involved the purchase of stock for cash: it was clearly outside the statute.

The *Von Weise* case [69 F. (2) 439] involved less than a majority of each class of stock: *no part of 10,000 shares* of preferred stock outstanding was acquired (see p. 440). The transaction was, accordingly, not within the terms of the statute.

The *Nelson* case [75 F. (2) 696] turned on the nature of the transaction. The Court emphasized particularly that the transferror received $2,000,000 *in cash* and 12,500 shares of *non-voting* stock of a newly organized corporation,

whereas the *other* party to the transaction held the entire 30,000 shares of *voting* stock, with the result (p. 698):

> "that the control of the property conveyed passed to a stranger, *in the management of which petitioner retained no voice.*"

In our case, respondents received 32,103 shares of the voting stock of the transferee and, in addition, by the terms of the agreement (R. 64), the respondent Sloane, the Trustee for all the respondents, became a director and a member of the Executive Committee of the transferee.

The *G. & K.* case [76 Fed. (2) 454] was a case of transfer of *assets*. It was not a transfer of *stock*, as is our case, in which it is undisputed that the element of resultant control is not involved (Petitioner's Brief in *Minnesota Tea Co.* case, p. 31). The corporation whose assets were transferred not only retained its identity and existence, but, by the very terms of the agreement, provision was made for its continued competition with the transferee in all except eight specified states. Many important assets of the transferror corporation were excepted from the conveyance and the Court found (p. 456):

> "Hence the taxpayer did not show with certainty that all, or even substantially all, of its assets were transferred; and, even if such a transfer did take place, the taxpayer remained in existence, possessed of a substantial amount of money, qualified to engage in active business in its own capacity or through its subsidiaries, and with the intent so to do, so far as the record shows."

There is no such situation here. Vanadium acquired *all* the stock of Alloys and Alloys continued to exist only as the wholly owned and controlled subsidiary of Vanadium.

(2)

The Treasury regulation to which the Court below referred is not, as petitioner contends, inconsistent with the decision of this Court in the *Pinellas* case. This Court held in the *Pinellas* case that the words within the parenthesis expand the meaning of the words "merger or consolidation" in Subdivision A of Section 203 (h) (1). The Treasury regulation gives examples of cases which would fall within such expanded meaning. This Treasury regulation (Regulation 62, Article 1566 b) includes:

> "(3) The sale of the stock of B to A, or * * * (6) the acquisition by A of a majority of the voting stock and a majority of the total number of shares of all other classes of stock of B * * *."

Nothing said in the *Pinellas* case is in any respect inconsistent with that regulation. Moreover, the re-enactment by Congress of the definition of "reorganization" contained in the statute, after it had been so interpreted by these regulations, gives the interpretation the force of a law (*Old Mission Portland Cement Company* v. *Helvering*, 293 U. S. 289; *Brewster* v. *Gage*, 280 U. S. 327). It is, of course, true that this Court is not bound by "contemporaneous interpretations" of the statute by administrative officers (Appellants' Brief in *Minnesota Tea Co.* case, p. 29): that, however, does not alter the fact that interpretations which have been approved and adopted by Congress, by re-enacting statutes *after* their interpretation, have the force of law and, if constitutional, are as binding on the Court as any other valid statute (see cases cited *supra*).

(3)

The last contention urged by petitioner (Brief, pp. 19-22) is that the decision of the Court below that the bonds received by respondents were "securities" is inconsistent with its own decision in the *Worcester* case [75 F. (2) 251]. The contention is without merit. In the *Worcester* case the petitioner, the Worcester Salt Co., on June 1, 1928, purchased the entire capital stock of the Kerr Co. Thereafter the Kerr Co. transferred all its assets, said to be worth $1,274,434.02, to the Worcester Salt Co. in exchange for bonds of the Worcester Salt Co. in the face amount of $680,000. In December, 1928, the Kerr Co. sold $300,000 of those bonds at par. The petitioner claimed a deductible loss in 1928 on the theory that its subsidiary, the Kerr Co., had received less on the sale of these bonds than the value of the assets which it had transferred in return for them. The case did not involve the meaning of "securities". That the Court regarded the bonds received as "securities" appears clearly from the following language in the opinion (p. 252):

> "The original basis of the bonds in the hands of the purchaser does not attach to the assets transferred in exchange, for Section 113 (*a*) (6), 26 U. S. C. A. Sec. 2113 (*a*) (6) states: 'This paragraph shall not apply to property acquired by a corporation by the issuance of its *stock or securities* as the consideration in whole or in part for the transfer of the property to it.' "

Inasmuch as no *stock* was issued in that case, the reference to "stock or securities" would have been meaningless unless the Court regarded the *bonds* which were issued as "securities".

Petitioner says in his brief (p. 20): "We appreciate that corporate bonds are commonly regarded as securities", but adds: "under statutes designed for different purposes".

The dictionaries, lay and law, define "securities" as including bonds secured by mortgage (see Webster's New International Dictionary, Abbott's Law Dictionary, Black's Law Dictionary). Mortgage bonds were held to be, or were recognized as, "securities" in *First National Bank* v. *U. S.*, 283 U. S. 142; *Burnet* v. *Brooks*, 288 U. S. 378; *Rosenthal* v. *Brown*, 247 N. Y. 479, and in other cases too numerous to mention. Bonds are so universally referred to, and treated as, "securities" that there would seem to be no justification for attributing to Congress an intention to *exclude* bonds when using the word "securities" in *this* statute, although it *included* bonds when using the same word in numerous *other* statutes.

(4)

The petitioner contends (Brief, pp. 11, 12-13) that the reorganization statute does not apply because Alloys, the corporation whose stock was transferred, was not a party to the contract, whereas Section 203 (b) (2) refers to transactions in which the stock or securities transferred are stock or securities in a corporation, a party to a reorganization. The answer to this contention is found in Subdivision (h) (2) of the same section, which provides:

> "The term 'a party to a reorganization' • • • includes *both corporations* in the case of an acquisition by one corporation of at least a majority of the total of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation."

Thus, by definition, Alloys was a "party to (the) reorganization", inasmuch as this transaction was one in which more than a majority, *i. e.*, all, of the voting stock of Alloys, was acquired by Vanadium. This provision of the statute would be unnecessary and meaningless if it did not apply to cases where the corporation was not a signatory to the plan.

The statement in petitioner's brief (pp. 11, 12) that there was no "reorganization plan" overlooks the contracts between the parties (R. 55-67). While it is true that this contract was not entitled "Plan of Reorganization", it constituted the plan and was just as real a plan of reorganization as if it had been so labeled. As the Court below said (R. 93): "The plan of reorganization was the contract made and performed."

Several of the contentions now made by petitioner are raised for the first time since the decision on the appeal in the Court below. These are (1) that bonds are not "securities" under the Act; (2) that the Treasury Regulation which expressly defined such a transaction as this as a reorganization was contrary to the terms of the statute, or, at least, to the judicial interpretation of the terms of the statute; and (3) that the statute does not apply to this transaction because Alloys was not nominally a party to the plan of reorganization. We have discussed these contentions on their merits, but in doing so we do not waive the point that petitioner is not entitled to raise them here because they were not raised below. (*West* v. *Rutledge*, 244 U. S. 90; *Ana Maria Sugar Co. Inc.* v. *Quinones*, 254 U. S. 245; *Board of Supervisors* v. *Lackawanna Iron & Coal Co.*, 93 U. S. 619; *Van Huffel* v. *Harkelrode*, 284 U. S. 225, 229.)

Conclusion.

The transaction here involved is a reorganization within the express terms of the statute and also under the Treasury Regulations promulgated pursuant to the statute.

There being no dispute that it was consummated solely for the purpose of carrying out legitimate corporate purposes, it constituted a reorganization under the statute. This, of course, does not mean that any profits realized from the transaction will escape tax. It means only that, as provided in the statute, any gain will be reported, and tax thereon paid, when the fruits of the transaction are sold or otherwise disposed of.

The decision of the Circuit Court of Appeals should be affirmed.

Dated, New York, N. Y., November 15, 1935.

Respectfully submitted,

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APPENDIX.

Statute and Regulations Involved.

Revenue Act of 1918, Section 202 (b):

> "* * * but when in connection with the reorganization, merger, or consolidation of a corporation a person receives in place of stock or securities owned by him new stock or securities of no greater aggregate par or face value, no gain or loss shall be deemed to occur from the exchange. * * *"

Regulations 45, Article 1567:

> "In general, where two (or more) corporations unite their properties by either (a) the dissolution of corporation B and the sale of its assets to corporation A, or (b) the sale of its property by B to A and the dissolution of B, or (c) the sale of the stock of B to A and the dissolution of B, or (d) the merger of B into A, or (e) the consolidation of the corporations, no taxable income is received from the transaction by A or B or the stockholders of either, provided the sole consideration received by B and its stockholders in (a), (b), (c), and (d) is stock or securities of A, and by A and B and their stockholders in (e) is stock or securities of the consolidated corporation, in any case of no greater aggregate par or face value than the old stock and securities surrendered."*

Revenue Act of 1921, Section 202 (c) (2):

> "* * * The word 'reorganization,' as used in this paragraph, includes a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total num-

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* This article was soon amended by a Treasury Decision, adding provisions pertinent to these cases (see *infra*, pp. 29-30).

ber of shares of all other classes of stock of another corporation, or of substantially all the properties of another corporation), * * * "

Regulations 62, Article 1566 (b):

" * * * Where two or more corporations unite their properties, by either (1) the dissolution of corporation B and the sale of its assets to corporation A, or (2) the sale of its property by B to A, or (3) the sale of the stock of B to A, or (4) the merger of B into A, or (5) the consolidation of A and B, or (6) the acquisition by A of a majority of the voting stock and a majority of the total number of shares of all other classes of stock of B or of substantially all of the properties of B, no taxable income is received from the transaction by A or B or by the stockholders of either corporation A or corporation B, provided the sole consideration received by the stockholders is stock or securities of corporations A or B or any corporation a party to or resulting from the reorganization."

Revenue Act of 1924, c. 234, 43 Stat. 253:

SEC. 202. (d) In the case of a sale or exchange, the extent to which the gain or loss determined under this section shall be recognized for the purposes of this title, shall be determined under the provisions of section 203.

* * * * * * * * * * *

SEC. 203. (a) Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 202, shall be recognized, except as hereinafter provided in this section.

(b) (1) No gain or loss shall be recognized if property held for productive use in trade or business or for investment (not including stock in trade or other property held primarily for sale, nor stocks, bonds, notes,

choses in action, certificates of trust or beneficial interest, or other securities or evidences of indebtedness or interest) is exchanged solely for property of a like kind to be held either for productive use in trade or business or for investment, or if common stock in a corporation is exchanged solely for common stock in the same corporation, or if preferred stock in a corporation is exchanged solely for preferred stock in the same corporation.

(2) No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization.

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(d) (1) If an exchange would be within the provisions of paragraph (1), (2), or (4) of subdivision (b) if it were not for the fact that the property received in exchange consists not only of property permitted by such paragraph to be received without the recognition of gain, but also of other property or money, then the gain, if any, to the recipient shall be recognized, but in an amount not in excess of the sum of such money and the fair market value of such other property.

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(h) As used in this section and sections 201 and 204—

(1) The term "reorganization" means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation), or (B) a transfer by a corporation of all or a part of its

assets to another corporation if immediately after the transfer the transferror or its stockholders or both are in control of the corporation to which the assets are transferred, or (C) a recapitalization, or (D) a mere change in identity, form, or place of organization, however effected.

(2) The term "a party to a reorganization" includes a corporation resulting from a reorganization and includes both corporations in the case of an acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation.

(i) As used in this section the term "control" means the ownership of at least 80 per centum of the voting stock and at least 80 per centum of the total number of shares of all other classes of stock of the corporation.

Treasury Regulations 65, relating to the Revenue Act of 1924:

ART. 1574. *Exchanges in connection with corporate reorganizations.*—Since corporate reorganizations which result only in a change in form and which do not substantially affect the property interests either of the shareholders or of the corporations may be required or may be made desirable by business conditions, State laws, or other causes, the statute provides that no gain or loss shall be recognized to the shareholders from the exchange of stock made in connection with the reorganization nor to the corporations from the exchange of property made in connection with the reorganization. If two or more corporations reorganize, for example, by either (1) the dissolution of corporation B and the sale of its assets to corporation A, or (2) the sale of its property by B to A, or (3) the sale of the stock of B to A, or (4) the merger of B into A, or (5) the consoli-

dation of A and B, or (6) the acquisition by A of a majority of the voting stock and a majority of the total number of shares of all other classes of stock of B or of substantially all of the properties of B, or (7) the transfer by A of all or a part of its assets to B where immediately after the transfer A or its shareholders are in control of B, then no taxable income is received from the transaction by corporation A or B if the sole consideration for the transfer of the assets is stock or securities of corporation A or B; and no taxable income is received from the transaction by the shareholders of either corporation A or corporation B if the sole consideration received by the shareholders is stock or securities of corporation A or B. Furthermore, if the reorganization is accomplished by the transfer by corporation A of a portion of its assets to corporation B in exchange for the stock of corporation B and corporation A distributes as a dividend to its shareholders the stock of corporation B, no taxable income is realized by the shareholders from the receipt of such dividends. (See art. 1576.)

In conformity with the principle of ignoring for tax purposes those reorganizations which result merely in a change in form, the statute provides further that the stock received by the shareholders in connection with the reorganization shall have the same basis for the purpose of determining gain or loss from its subsequent sale as the stock surrendered by them and that the assets acquired by a corporation a party to the reorganization shall have the same basis for the purposes of depreciation, depletion, and the determination of gain or loss from subsequent sale as they had in the hands of the corporation from which they were acquired. (See arts. 1596-1598.) The exchanges made by both the shareholders and the corporations in connection with a reorganization are ignored and both are treated thereafter as if the reorganization had not occurred.

Adequate provision is made in the statute for cases in which income is actually realized by the shareholders in connection with the reorganization through the receipt of cash or property other than the stock of a corporation a party to the reorganization. (See art. 1575.) In such cases the gain to the shareholder is recognized and taxed, but in an amount not exceeding the amount of the money or the other property received in connection with the reorganization. If the money so distributed in connection with the reorganization has the effect of the distribution of a taxable dividend, such gain is taxed not as a capital gain but as an ordinary dividend subject to the surtax rates. While placing no obstacle in the way of genuine reorganizations, the statute does not allow the use of reorganizations to avoid the tax.

Records in substantial form, showing the basis of the stock or property exchanged, and the amount of property or money received in exchange, must be kept to enable the determination of gain or loss from a subsequent disposition of the stock or property received or exchanged.

Revenue Act of 1928:

SEC. 113. BASIS FOR DETERMINING GAIN OR LOSS.

(a) Property acquired after February 28, 1913.—The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; except that—

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(6) Tax-Free Exchanges Generally.—If the property was acquired upon an exchange described in section 112 (b) to (e), inclusive, the basis shall be the same as in the case of the property exchanged, decreased in the amount of any money received by the taxpayer and in-

creased in the amount of gain or decreased in the amount of loss to the taxpayer that was recognized upon such exchange, under the law applicable to the year in which the exchange was made. If the property so acquired consisted in part of the type of property permitted by section 112 (b) to be received without the recognition of gain or loss, and in part of other property, the basis provided in this paragraph shall be allocated between the properties (other than money) received, and for the purpose of the allocation there shall be assigned to such other property an amount equivalent to its fair market value at the date of the exchange. This paragraph shall not apply to property acquired by a corporation by the issuance of its stock or securities as the consideration in whole or in part for the transfer of the property to it;

Treasury Regulations 45, Article 1567, amended by T. D. 2924, issued in December 1919 (see Cumulative Bulletin 1, page 44):

21-19-522.
T. D. 2924.

SECTION 202, Article 1567: Exchange of stock for other stock of no greater par value.

Revenue Act of 1918.—Modification of articles 1566 and 1567 of Regulations 45.

2. Article 1567 of Regulations 45, as amended by Treasury Decision 2870, is amended to read as follows:

Art. 1567. Exchange of stock for other stock of no greater par value.—In general where two (or more) corporations unite their properties by either (a) the dissolution of corporation B and the sale of its assets to corporation A, or (b) the sale of its property by B to A and the dissolution of B, or (c) the sale of the stock of B to A and the dissolution of B, or (d) the merger of B into A, or (e) the consolidation of the corporations,

no taxable income is received from the transaction by A or B or stockholders of either, provided the sole consideration received by B and its stockholders in (a), (b), (c), and (d) is stock or securities of A, and by A and B and their stockholders in (e) is stock or securities of the consolidated corporation, in any case of no greater aggregate par or face value than the old stock and securities surrendered. The term "reorganization," as used in section 202 of the statute, includes cases of corporate readjustment where stockholders exchange their stock for the stock of a holding corporation, provided the holding corporation and the original corporation, in which it holds stock, are so closely related that the two corporations are affiliated as defined in section 240 (b) of the statute and article 633, and are thus required to file consolidated returns. So-called "no-par-value stock" issued under a statute or statutes which require the corporation to fix in a certificate or on its books of account or otherwise an amount of capital or an amount of stock issued which may not be impaired by the distribution of dividends, will for the purposes of this section be deemed to have a par value representing an aliquot part of such amount, proper account being taken of any preferred stock issued with a preference as to principal. In the case (if any) in which no such amount of capital or issued stock is so required, "no-par-value stock" received in exchange will be regarded for purposes of this section as having, in fact, no par or face value, and consequently as having "no greater aggregate par or face value" than the stock or securities exchanged therefor.

Revenue Act of 1918, Section 240 * * * (b):

"(b) For the purpose of this section two or more domestic corporations shall be deemed to be affiliated (1) if one corporation owns directly or controls through closely affiliated interests or by a nominee or nominees

substantially all the stock of the other or others, or (2) if substantially all the stock of two or more corporations is owned or controlled by the same interests."

Treasury Regulation 45 (1918), Article 633:

"Art. 633. *When corporations are affiliated.*—Corporations will be deemed to be affiliated (a) when one domestic corporation owns directly or controls through closely affiliated interests or by a nominee or nominees substantially all the stock of the other or others, or (b) when substantially all the stock of two or more domestic corporations is owned or controlled by the same interests. * * *."